FEDERAL PANDERING ADVERTISEMENTS STATUTE: THE RIGHT OF PRIVACY VERSUS THE FIRST AMENDMENT

Title III of the Postal Revenue and Federal Salary Act of 1967[1], entitled: "Prohibition of pandering advertisements in the mails," offers a procedure whereby any householder who receives an advertisement which he alone believes to be erotically arousing or sexually provocative may insulate himself from further mailings by the same sender. As originally drafted, the House bill[2] left the determination of the nature of the mail matter to the Postmaster General. The bill was amended[3] to leave that determination solely to the recipient, and it passed the House and Senate in that form.

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[1] 39 U.S.C.A. § 4009 provides:

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addresses thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commending compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

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[2] 113 CONG. REC. 28659 (1967).

[3] *Id.* at 28659-60.

Enactment of the statute triggered an extensive public response. During the first eighteen and one-half months, the Post Office Department received 368,868 requests for prohibitory orders.[4] The Department automatically complies with any such request, requiring only that it be accompanied by the mailed advertisement which the recipient deems offensive.[5] As a consequence, the sender must refrain from further mailings to the same addressee and is put to the expense of purging the addressee's name from all mailing lists he owns or controls.[6] While it appears that most requests are bona fide, others involve advertisements that could in no sense be considered "pandering."[7] Members of the direct mail advertising industry challenged the constitutionality of the statute under the first amendment and under the fifth amendment due process guarantee. Hearing the case on direct appeal, *Rowan v. United States Post Office Department*,[8] the Supreme Court upheld the statute. The Court referred briefly to the constitutional infirmities of commercial enterprise and obscenity but based its holding primarily on the individual householder's right of privacy. The line of cases severely limiting government interference with mailing privileges was ignored. The *Rowan* decision appears to have raised the right of privacy to the status of a constitutional imperative and paved the way for further federal endorsement of reclusion.

I. The Rowan Decision

Appellants, who are publishers, distributors, owners and operators of mail order houses, mailing list brokers and owners and operators of mail service organizations, alleged they had received numerous prohibitory orders pursuant to the provisions of the statute. They initiated a declaratory judgment action[9] in the United States District Court for the Central District of California on the ground that 39 U.S.C. § 4009 is unconstitutional. Appellants contended that the statute violated their rights of free speech and due process as guaranteed by the first and fifth amendments of the Constitution. Construing subsections (b) and (c) as prohibiting "advertisements similar" to those initially mailed to the addressee, a three-judge court[10] determined that § 4009 was constitutional. On direct appeal,[11] the United States Supreme Court affirmed but broadened the interpretation of the section to allow the addressee complete and unfettered discre-

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[4] Data from Brief for Respondents at 14, 397 U.S. 728 (1970).

[5] *See* discussion at note 45 *infra.*

[6] *See* note 1 *supra* at (c).

[7] *See* discussion at note 43 *infra.*

[8] 397 U.S. 728 (1970).

[9] Under 28 U.S.C. § 2201 (1964).

[10] Convened pursuant to 28 U.S.C. § 2284 (1964).

[11] Under 28 U.S.C. § 1253 (1964).

tion in electing whether or not to receive any further material from the sender.

In addition to upholding the statutory right of addressees to exercise their unfettered discretion in determining whether or not they shall receive further materials from a particular sender, the Supreme Court validated § 4009's mailing list proscriptions[12] and the Post Office Department's enforcement procedures.[13] The appellants contended that the required purging of their mailing lists is confiscatory. The Court held, however, that the burden does not amount to a fifth amendment due process violation "[p]articularly when . . . it is being applied to commercial enterprises."[14] With respect to the due process aspects of the Post Office Department's enforcement procedures,[15] the Court held that: "It is sufficient that all available defenses, such as proof that no mail was sent, may be presented to a competent tribunal before a contempt finding can be made."[16]

In its debate on § 4009, the Senate was concerned that the courts might not accept the standardless determination of erotically arousing or sexually provocative by any addressee.[17] The Supreme Court disposed of that concern by pointing out that: "Congress provided this sweeping power [of the householder] . . . to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official."[18]

Mr. Justice Brennan, joined by Mr. Justice Douglas, in a separate concurring opinion agreed that the discretion accorded the addressee, insofar as the statute ". . . permits [him] . . . to require a mailer to remove *his* name from its mailing lists . . ."[19] is constitutional. Justice Brennan suggested, however, that the use of the statute by parents to prevent their children,[20] even if they are eighteen years old, from receiving political, religious or other materials which the parents find offensive, ". . . is not without our constitutional difficulties."[21] He ". . . understand[s] the Court to leave

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[12] *See* note 1 *supra* at (c).

[13] 39 C.F.R. pt. 916 (1968).

[14] 397 U.S. at 740 (quoting from the decision of the district court below).

[15] *See* note 13 *supra.* 39 U.S.C.A. § 4009 (h) provides:

(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

[16] 397 U.S. at 739.

[17] 113 CONG. REC. 34231 (1967) (remarks of Senator Javits).

[18] 397 U.S. at 737. *See also* Lamont v. Postmaster General, declaring unconstitutional an act setting ". . . administrative officials astride to flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail." 381 U.S. 301, 306 (1965).

[19] 397 U.S. at 741.

[20] *See* note 1 *supra* at (g).

[21] 397 U.S. at 741.

open [this] question. . . ."[22] The decision, then, was based on a balancing of appellants' first amendment rights against every individual's right of privacy.[23]

II. PURPOSE OF THE STATUTE

In view of the Court's sweeping statement that: "In operative effect the power of the householder under the statute is unlimited; he or she may prohibit the mailing of a dry goods catalog . . .",[24] it is instructive to review the legislative history of the bill as a guide to the intent of Congress respecting the type of mail matter to be controlled. The bill, which with minor but significant language changes, became § 4009, Chapter 51 of title 39, *United States Code*, was reintroduced in the 90th Congress by Representative Glenn Cunningham of the Second District of Nebraska. In his remarks to the House, Mr. Cunningham described the material that the statute was intended to control as ". . . obscene, sexually provocative advertising—pandering advertising. . . ."[25] Mr. Roman Hruska, Senator from Nebraska, who introduced the companion measure into the Senate said that: "Title III would allow the recipient of obscene mail to return it to the Postmaster General . . ."[26] and urged the support of all Senators for the bill so ". . . that dealers in filth and obscenity will know exactly where they stand with the U.S. Congress."[27]

Whatever the intention of Congress may have been, it was generally understood that to avoid constitutional objections, the intention could not be precisely verbalized in the statute. Representative Waldie, whose amendment gave the statute its final form, recognized the potential first amendment problem inherent in requiring the Postmaster General to determine whether the objectionable material meets Supreme Court obscenity standards. In support of his amendment, he urged that: "By removing . . . the right of the Government to involve itself in any determination of the content and nature of these objectionable materials . . . the first amendment [is precluded] from having any application whatsoever."[28] The Court agreed, recognizing that: "Congress provided this sweeping power . . . to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official."[29]

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[22] *Id.*

[23] *Id.* at 736: "But the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."

[24] *Id.* at 737.

[25] 113 CONG. REC. 28660 (1967).

[26] *Id.* at 34232.

[27] *Id.*

[28] *Id.* at 28660.

[29] 397 U.S. at 737.

Nevertheless, § 4009, as passed, presents several problems of interpretation. One difficulty, which was dealt with by the Court, stems from the incompatible wording of subsections (a) and (b). Subsection (a) says that a mailer of the matter described ". . . shall be subject to the order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof." Subsection (b) and subsequent sections,[30] however, say that the order of the Postmaster General directs ". . . the sender and his agents or assigns to refrain from further mailings to the named addressees." The Court characterizes these subsections as being amenable to three plausible constructions: "The order could prohibit all future mailings to the addressees, all future mailings of advertising material to the addressees, or all future mailings of similar materials."[31] The legislative history,[32] the Court asserts, ". . . supports an interpretation that prohibits all future mailings independent of any objective test."[33] Limiting the prohibitory order to similar materials is open to the criticisms that ". . . it would expose the householder to further burdens of scrutinizing the mail for objectionable material . . . [and] it would interpose the Postmaster General between the sender and the addressee [to] . . . create the appearance if not the substance of governmental censorship."[34]

At another point, both the Court's opinion and the legislative history differ from the wording of the statute. Subsection (a) says: "Whoever . . . mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative. . . ." Gramatically, at least, the requirement of this section is that the addressee's judgment be directed to the matter offered for sale rather than just to the advertisement. On the other hand, the legislative history clearly indicates the intention that the recipient's judgment should extend only to the character of the advertisement itself.[35] The Court, while quoting the statute in its opinion, sides with the legislative history, and refers to ". . . unsolicited advertisements that recipients found to be offensive because of their lewd and salacious character."[36] In this instance, the literal wording of the statute

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[30] *See* note 1 *supra* at (b), (c), (e) and (f).

[31] 397 U.S. at 732.

[32] "The Postmaster General is then required to issue an order to the sender directing him to refrain from sending any further mailings of any kind to such person." S. Rep. No. 801, 90th Cong., 1st Sess. 38 (1967). *See also* 113 CONG. REC. 28660 (1967) (remarks of Representative Waldie) and 34231 (1967) (remarks of Senator Monroney).

[33] 397 U.S. at 734.

[34] *Id.* at 735.

[35] "Title III would allow the recipient of obscene mail to return it to the Postmaster General. . . ." 113 CONG. REC. 34232 (1967) (remarks of Senator Hurska). ". . . [I]f you or your minor child receives some of this obscene, sexually provocative advertising. . . ." 113 CONG. REC. 28660 (1967) (remarks of Representative Cunningham).

[36] 397 U.S. at 731.

must yield since the only subject for judgment at hand is the mailing which is required by the statute to be an advertisement.

Finally, it is interesting to note that Timothy May, then General Counsel for the United States Post Office, expressed the opinion before a Senate Committee hearing on the bill that ". . . an addressee . . . would be empowered to determine that all 'occupant' mail, soap advertisements, bills from creditors, income tax forms, even a letter from [his] Congressman, were pandering advertisements, and could prohibit any further mailings from such mailers on pain of contempt of court."[37] Both the Court and the Post Office Department, however, have since disavowed such a broad interpretation. Both require that an objective finding be made, first by the Post Office Department and later, if necessary, at a hearing, that ". . . the initial material mailed to the addressee was an advertisement. . . ."[38]

III. Effect of the Statute

Representative Cunningham asserted as a justification for the statute that ". . . during [the year prior to its enactment] . . . one-quarter million complaints have come into the Post Office Department with reference to this type of pandering advertisement. . . ."[39] Between the effective date of the statute, April 14, 1958, and November 1, 1969, a period of eighteen and one-half months, the Post Office Department received 368,868 requests for prohibitory orders. During the same period, 291,340 prohibitory orders were issued. As of December 31, 1969, 2,121 complaints under the statute were pending in the district courts and thirteen complaints had been acted upon. Most of the thirteen complaints were resolved by default in favor of government.[40] One of appellants asserted that he had received 250 prohibitory orders and more than 3,000 requests from mailing list renters to remove names. He estimated his name-removal costs at $7,000.[41] While counsel for respondents contended that: "No action has yet been filed against an advertiser whose material could not reasonably be thought to be pandering within the statutory contemplation. . . ,"[42] amicus curiae in support of appellant suggested that the same may not always be true. Amicus called the Court's attention to the fact that prohibitory orders have been served upon direct mail advertisers for ". . . such things as The Family Heritage Bible, La Salle Extension University, Business Week Magazine, Illustrated Electronics Course, The Christian Herald's Family Bookshelf, The American Scholar Magazine, The Center for the Study of Democratic

[37] *Hearings on H.R. 7977 Before the Senate Comm. on Post Office and Civil Service*, 90th Cong., 1st Sess., 545 (1967).

[38] 397 U.S. at 739.

[39] 113 CONG. REC. 28660 (1967).

[40] Data from Brief for Respondents at 14, 397 U.S. 728 (1970).

[41] *Id.* at 48.

[42] *Id.* at 14.

Institutions, Roget's International Thesaurus, hospital insurance plans, grocery store weekend specials, tool kits, etc. . . . indicat[ing] that § 4009 has been indiscriminately employed against all types of advertising."[43]

IV. Administration of the Statute by the Post Office Department

At the time the statute became effective, the Post Office Department issued two documents dealing with its administration. The first, *POD Publication 125*,[44] was directed to Postal Services Center Employees and was intended to define the functions required of them by the statute. Under *II. THE PATRON'S RESPONSIBILITY*, *Publication 125* points out that the recipient has the sole responsibility for deciding that a mail piece is a pandering advertisement offering to sell erotically arousing or sexually provocative matter. To trigger § 4009 proceedings, a patron must notify the Post Office Department of his determination and identify himself, the sender of the material and the name of any unmarried, pre-nineteen age children at his residence who are to be protected against future mailings. This information may be submitted on Post Office Department Form 2150 or, if that is not available, on plain paper. It is sent, together with the objectionable mailing including wrapper and enclosures, to the local postmaster or postal services center. In *III. PROCESSING THE PATRON'S REQUEST*, the Post Office Department emphasizes that ". . . the only question to be determined by the services center with respect to the offending mail piece is whether it constitutes an advertisement."[45] An advertisement is defined as ". . . material—including, but not limited to, display, classified or editorial styles—which offers for sale any matter which the addressee thereof believes, in his sole discretion, to be erotically arousing or sexually provocative."[46] If the patron does not furnish the necessary information, or does not enclose all of the offending mail piece, his request is returned with the suggestion that it be corrected. When possessed of the necessary information, the services center postmaster issues a prohibitory order directing ". . . the mailer of the pandering advertisement, effective thirty calendar days after the mailer's receipt of the Order, to make no further mailings of any kind to the persons protected by the Order."[47] As *POD Publication 125* points out, such a prohibition ". . . extends to any and every type mailing, not just future pandering advertisements."[48] The Order also directs the mailer ". . . to delete the names of the persons pro-

[43] Brief for Direct Mail Advertising Assoc. Inc., Amicus Curiae at 4, 397 U.S. 728 (1970).

[44] ADMINISTERING THE PANDERING ADVERTISEMENTS STATUTE (POD Publication 125 April 1968).

[45] *Id.* at 5.

[46] *Id.*

[47] *Id.* at 6.

[48] *Id.*

tected by the Order from all mailing lists owned or controlled by the mailer or his agents or assigns [and] . . . to immediately refrain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the protected persons."[49] Further sections of the *Publication* deal with post office actions following violation of a prohibitory order.

A much briefer pamphlet entitled, *HOW YOU CAN CURB PANDERING ADVERTISEMENTS*[50] was published for general distribution. This pamphlet also emphasizes that the determination of whether material is erotically arousing or sexually provocative is up to the recipient but makes it clear that the statute relates specifically to advertising.

V. CONSTITUTIONAL IMPLICATIONS OF THE STATUTE AND DECISION

The Court considers appellants' arguments that: " 'The freedom to communicate orally and by written word and, indeed, in every manner whatsoever is imperative to a free and sane society.' "[51] and replies that ". . . the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."[52] Thus, the statute is constitutional if the individual recipient's right to privacy outweighs the mailer's first amendment speech rights. The Court concludes that: "If [the statute] operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient."[53]

With *Rowan*, the right of privacy, which was little recognized in this country before the 1890 Warren-Brandeis article,[54] reached a new high watermark as a constitutional imperative. Though Judge Cooley in 1878, had referred to privacy as the right "to be let alone,"[55] other contemporary commentators considered the concept to be no more than a property or implied contract right.[56] Consequently, early privacy law operated only to prevent the exposure of one's private life to public scrutiny. Soon after the Warren-Brandeis article, however, the state courts began to develop the concept that privacy might include the right to insulate oneself from unsolicited annoyances or expressions by others.[57] This aspect of privacy appears in Mr. Justice Brandeis' dissent to *Olmstead v. United States*[58]

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[49] *Id.*

[50] POD Publication 123 (Rev.) (June 1969).

[51] 397 U.S. at 735 (quoting Brief for Appellants at 15).

[52] *Id.* at 736.

[53] *Id.* at 738.

[54] Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[55] 1 T. COOLEY, LAW OF TORTS 29 (1879).

[56] *See* Comment, *Advertising and The Right of Privacy*, 9 VILL. L. REV. 274, 275 (1963-64) and Patterson, *Privacy: A Summary of Past and Present*, 35 PENN. B.A.Q. 52, 54 (1963-64).

[57] *See* Pavesich v. New England Life Insurance Co., 122 Ga. 190, 197-98, 50 S.E. 68, 71 (1904).

[58] 277 U.S. 438, 478 (1928).

wherein he said: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Then, starting in 1943, a series of Supreme Court decisions balancing the right of privacy in the home against the free speech rights of solicitors, confirmed the householder's right to decide whether he would receive door-to-door solicitors,[59] dismissed an appeal from a state court decision upholding a trespass statute prohibiting unwanted solicitations,[60] upheld an ordinance forbidding loud and raucous noises on public streets[61] and upheld Green River Ordinances which forbid solicitations at private residences without consent.[62] In 1965 privacy acquired the status of a constitutional right.[63] Speaking for the Court in *Griswold v. Connecticut*, Mr. Justice Douglas said ". . . that specific guarantees in the Bill of Rights have penumbras, formed by eminations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy."[64]

One of the few asserted limitations on the right of individual privacy is found in *Public Utilities Commission v. Pollak* which holds that: "However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."[65] That case dealt with petitioner's objection to radio programs on government operated streetcars and busses. Mr. Justice Douglas dissented reminding the Court that the streetcar audience is a captive one that should not be subject to invasion of its privacy ". . . over and beyond the risks of travel."[66] In an obscenity case, the Court commented that ". . . we do not think [obscenity statutes] reach into the privacy of one's own home."[67] It added, in the 1968 constitutionality test of a New York statute prohibiting the sale of defined material to minors, that: "When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees."[68] Judicially, then, the stage was set for the *Rowan* decision permitting the government to assist the homeowner to control the flow of unwanted advertisements to his mailbox.

At about the time the Court was beginning to strengthen the home-

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[59] Martin v. Struthers, 319 U.S. 141 (1943).

[60] Hall v. Commonwealth, 188 Va. 72, 49 S.E.2d 369, *appeal dismissed*, 335 U.S. 875 (1948).

[61] Kovacs v. Cooper, 336 U.S. 77 (1949).

[62] Breard v. Alexandria, 341 U.S. 622 (1951).

[63] Griswold v. Connecticut, 381 U.S. 479 (1965).

[64] *Id.* at 484.

[65] 343 U.S. 451, 464 (1952).

[66] *Id.* at 468.

[67] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[68] Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring).

owner's right to privacy, it was assigning a preferred Bill of Rights status to first amendment freedoms,[69] though that concept was later moderated[70] and criticized in concurring[71] and dissenting opinions.[72] Speech protected by the first amendment has been said to include all utterances except the lewd and obscene, the profane, the libelous, insulting or fighting words,[73] fraud[74] and speech constituting a clear and present danger that it would bring about substantive evils within the power of the government to prevent.[75] In *Jamison v. Texas*,[76] the concept that commercial speech may have less weight on the constitutional scale than non-commercial speech was introduced. But in 1966, the Court asserted that ". . . commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."[77]

In a long series of decisions dealing with the first amendment rights of post office patrons, the courts have gone from a 1904 holding that ". . . [a] legislative body in . . . establishing a postal service may annex such conditions . . . as it chooses"[78] to an almost complete proscription on mailing limitations in 1969. First amendment protections were guaranteed to sealed letters in 1878.[79] In 1946, the Supreme Court reversed an order denying second-class mailing privileges to a magazine because it was in poor taste and vulgar and did not contribute to the public good and welfare.[80] Sixteen years later three concurring justices concluded that a statute banning from the mails materials not patently offensive would encounter constitutional obstacles.[81] The judicial retreat from congressional hegemony over the post office was completed in 1969 when the Fifth Circuit Court of Appeals held that the use of the mails is no longer a privilege to which Congress may freely attach such conditions as it desires.[82] There seemed to be no dispute, at least until *Rowan*, that: "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read. . . . Without those peripheral rights the specific rights would be less secure."[83]

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69 Thomas v. Collins, 323 U.S. 516, 529-30 (1945).

70 Kovacs v. Cooper, 336 U.S. 77, 88 (1949).

71 *Id.* at 90 (Frankfurter, J., concurring).

72 Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

73 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

74 Parr v. United States, 363 U.S. 370, 389 (1960).

75 Schenck v. United States, 249 U.S. 47, 52 (1919).

76 318 U.S. 413, 417 (1943).

77 Ginzburg v. United States, 383 U.S. 463, 474 (1966).

78 Public Clearing House v. Coyne, 194 U.S. 497, 506 (1904).

79 *Ex parte* Jackson, 96 U.S. 727, 733 (1878).

80 Hannegan v. Esquire, 327 U.S. 146, 149-50 (1946).

81 Manual Enterprises v. Day, 370 U.S. 478, 495-519 (1962) (Brennan, J., concurring).

82 Hiett v. United States, 415 F.2d 664 (5th Cir. 1969) *cert. denied* 397 U.S. 936 (1970).

83 Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

In several past clashes between first amendment and other rights, the Supreme Court has taken note of the availability of means of communication other than the one at issue. In *Breard v. Alexandria*, for instance, in banning unwanted door-to-door solicitations, the Court noted that: "The usual methods of solicitation—radio, periodicals, mail, local agencies—are open."[84] In a subsequent labor relations case, Justice Harlan in dissent commented that a picketing prohibition was ". . . not inconsistent with the protections of the First Amendment, particularly when . . . other methods of communication are left open."[85] Such alternatives not being available to the appellants in *Rowan*, a determinative clash between the advertising mailer's first amendment rights to postal services and recipient's right of privacy was unavoidable.

Now, the question arises whether the *Rowan* decision is the logical consequence of past decisions or a break with judicial precedents. The privacy decisions clearly support *Rowan*. The Post Office Department first amendment decisions do not. The status of the latter prior to *Rowan* is summed up by the *Hiett* holding that:

> When a postal law affects expression, the exercise of the postal power must be tested against the first amendment. . . . [A] statute affecting expression, even if enacted under the postal power, is constitutional only if either (1) it meets the twin tests of specificity and narrowness or (2) the expression it affects is not protected speech.[86]

Unless that decision is to be reversed and earlier Supreme Court decisions implicitly overruled, precedent would seem to require that mailed advertisements subject to prohibitory orders be characterized as unprotected speech. If so, such advertisements must be a type of speech already denied protection by the Court.[87]

The statute speaks of pandering advertising and material believed to be erotically arousing or sexually provocative, but it clearly may affect material that is not lewd or obscene. "In operative effect the power of the householder under the statute is unlimited; he or she may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise."[88] Objectively, then, nothing more is required of the mailer to trigger the statute than that he mail an advertisement to an unwilling recipient. But is an advertisement unprotected speech? As noted above, *Jamison v. Texas*[89] suggested that commercial speech has less first amendment weight than non-commercial speech. A year earlier, *Valentine v. Chrestensen*[90] held that handbill distribution

[84] 341 U.S. 622, 631-32 (1951).

[85] NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58, 93 (1964).

[86] Hiett v. United States, *supra* note 82, at 669.

[87] *See* discussion at notes 73-5 *supra.*

[88] 397 U.S. at 737.

[89] 318 U.S. 413, 417 (1943).

[90] 316 U.S. 52 (1942).

may be kept off the streets to the extent it interferes with their use by people, but suggested that if the handbills were not advertisements they might be protected. Since then, however, the Court has uniformly rejected the concept that commercial speech suffers from any first amendment infirmity.

> "Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive."[91] "Valentine . . . has not survived reflection."[92] ". . . [C]ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."[93]

The *Rowan* Court also discouraged any appeal to the second-class commercial speech theory by stating that: "If this [statute] operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient."[94] "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit. . . ."[95]

In its *Ginzburg v. United States* decision,[96] affirming a federal obscenity statute[97] conviction, the Court gave conclusive weight to the fact that petitioner characterized the material to be mailed as obscene in his advertisements. In that sense, the *Rowan* decision may be an extension of *Ginzburg*. Prior to *Ginzburg*, an affirmative finding that the mailed material was obscene had to be made by federal authorities applying the *Roth* test.[98] In the *Ginzburg* decision, the Court suggested that if the mailer himself characterizes the mail piece as obscene, in close cases federal authorities may take him at his word and find a violation. *Rowan* can be viewed as merely removing the determination one step further from the government by making the recipient the judge. While the *Rowan* Court makes no allusion to the *Ginzburg* case, explaining the lack of first amendment protection for mail covered by § 4009 seems easier precedentially on a nonprotected, subjectively determined obscenity theory than on a commercial speech theory.

Another possibility is that § 4009 mail is not unprotected speech. The Court's references to advertisements and to obscenity are brief compared with its expansive treatment of privacy. They may be no more than a necessary concession to the legislative history and statutory language. The

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91 Cammarano v. United States, 358 U.S. 498, 514 (1959).

92 *Id.* at 513-14.

93 Ginzburg v. United States, 383 U.S. 463, 474 (1966). *See also* Smith v. California, 361 U.S. 147, 150 (1959); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

94 397 U.S. at 738.

95 *Id.* at 737.

96 383 U.S. 463 (1966).

97 18 U.S.C. § 1461 (1964).

98 ". . . [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 354 U.S. 476, 489 (1957).

real thrust of the Court's decision may be that privacy is now a pervasive right that can be curtailed only by a specific limitation in the Constitution — perhaps an individual right that is analogous to the now partially discredited[99] right of the State to protect itself and the public order from endangering speech. Speaking of the "State" right in 1927, the Court said that: ". . . the Constitution does not confer an absolute right to speak . . . and that a State . . . may punish those [making] . . . utterances inimical to the public welfare . . . is not open to question."[100] The *Rowan* Court's treatment of the individual's privacy right is startlingly parallel: "Nothing in the Constitution compels us to listen to or view any unwanted communication. . . . . . [T]he power of the householder . . . is unlimited; he . . . may prohibit the mailing because he objects to the contents. . . ."[101] If this analysis is correct, the householder's right to bar other types of subjectively undesirable communication from his premises merely awaits appropriate legislation. Timothy May, then General Counsel for the United States Post Office, forecast a result nearly that extensive under § 4009 and predicted it would ". . . plunge the postal system into chaos, and most certainly destroy the mail advertising industry."[102]

Regardless of the constitutional basis for *Rowan*, the construed statute clearly does not make direct mail advertising illegal per se, but it may affect the industry's economic vitality. By virtue of the "operative effect" language of the Court,[103] no mailer can predict what type of advertisement will incur a prohibitory order. For the broad spectrum of mailers, including the majority that do not send pandering advertisements but merely offer goods that serve the normal daily commerce of the nation, a bad guess incurs the economic penalties associated with the purging of their mailing lists.[104] The material offered for sale may be a *Bible*, an American flag, a subscription to *Playboy*. It makes no difference. If the recipient can demonstrate that the mailing is an advertisement, he can procure the issuance of a prohibitory order, and compliance with that order will increase the mailer's costs. Since his costs help determine his effectiveness in the market place, increased costs may mean decreased viability. Under the statute, this consequence flows not from his motives or the goods of his commerce, but from the fact that he mails his advertisements. The legislative history does not reveal that Congress intended that result.

Application of the statute may produce additional anamolous effects.

> The legislative history indicates that Congress accepted the possibility that some mail recipients would use § 4009 to avoid mail . . . [which]

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99 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

100 Whitney v. California, 274 U.S. 357, 371 (1927).

101 397 U.S. at 737.

102 *Hearings*, *supra* note 37.

103 397 U.S. at 737.

104 *See* note 12 *supra*.

> they did not genuinely believe to . . . [be] pandering. . . . [I]ts extension to [such] areas . . . is supported chiefly by considerations of workability and convenience.[105]

If Congress also recognized that recipients could use the statute to exert economic pressure on a mailer, such as union pressure against an employer, it did not say so. Respondent, in its brief, recognized this possibility and suggested that if a limitation on the statute will answer the complaints of mailers, the courts could ". . . look behind the addressee's formal complaint to discover whether he in fact made in good faith the determination the statute calls for."[106] Respondent also suggests that mailers ". . . may well have a private tort remedy for any damages caused by the sting of a false accusation of pandering recklessly or maliciously made."[107]

If Congress' statutory intent was to bar only unwanted obscenity from the mails, it failed in another respect. The Court makes it clear that a mailed advertisement which is not objectionable by any objective test can still trigger a prohibitory order banning future mailings regardless of their value. Ignoring for the moment other obscenity statutes, any mailer, however, can mail offensive material of a non-advertising nature without limitation. As the statute is worded, a mailer may even send advertisements that only offer offensive material for lease, rental or exchange. While the language of *Rowan* suggests that such advertisements would not escape the proscriptions of the statute, the Postal Services Centers Guide limits offending mail pieces to material ". . . which offers for sale any matter which the addressee . . . believes . . . to be erotically arousing or sexually provocative."[108]

The Supreme Court's emphasis on the right of privacy in the home almost assures that similar statutes covering unwanted telephone and telegraph advertisements would be constitutional. Since: "Nothing in the Constitution compels us to . . . view any unwanted communication . . .",[109] a statute requiring senders to identify their mailings so that the post office could suspend delivery of certain types at the addressee's request may also be constitutional. From there it is a short step to a requirement that radio and TV advertisers segregate and assign their advertisements to one clearly identified period in each program which the audience could avoid if it wished. Applying the Court's dictum,[110] it is difficult to show that any constitutional right of the advertiser would be violated by such a requirement.

There remains the question as to where, if at all, the individual's right

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105 Brief for Respondents at 37-38, 397 U.S. 728 (1970).

106 *Id.* at 39-40.

107 *Id.* at 39.

108 POD Publication 125 *supra* note 44, at 5.

109 397 U.S. at 737.

110 397 U.S. at 740 (quoting from the opinion of the district court below).

of privacy must yield to the citizen's need to know in order to participate in a democracy. The Supreme Court recently said that: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."[111] "[The] right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society."[112] The other aspect of the problem is expressed by Harper and James in their tort text: ". . . [S]ociety cannot protect the neurotically thin-skinned against those trivial invasions of privacy which the normal person suffers with equanimity."[113] An alternative, of course, to the barring of mail at the source is the recipient's ". . . short, though regular, journey from mail box to trash can. . . ."[114]

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111 Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

112 Stanley v. Georgia, 394 U.S. 557, 564 (1969).

113 1 HARPER AND JAMES, THE LAW OF TORTS 691 (1956).

114 Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y.) *aff'd per curiam*, 386 F.2d 449 (2d Cir. 1967).